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Soldiers and Sailors Civil Relief Act, Its Provisions and Effect

By L. A. HELLERSTEIN*

The Soldiers and Sailors Civil Relief Act was enacted during the World War (March 8, 1918, Chap. 20, 40 Stat. 440) in order to protect the rights of citizens in military service. An early article commenting upon this act stated that it was intended to "free persons in military service of the United States from harassment and injury to their civil rights during the term of service and to enable them to devote their entire energy to the military needs of the nation. It covers such subjects as staying court proceedings, non-eviction for failure to pay rent, prohibiting foreclosure of mortgages, prohibiting the lapsing of insurance policies, etc. On the whole, the method of the act consists mainly in suspending proceedings and transactions during the soldier's or sailor's absence so that he may have an opportunity when he returns to be heard and take measures to protect his interest.' "†

Section 4 of the Joint Resolution of Congress under the National Guard Act (approved August 27, 1940) granted to persons called to active service in the National Guard, United States Army Reserves and Retired Personnel the benefits of certain provisions of the act.

Section 13 of the Selective Training and Service Act of 1940 (approved September 16, 1940) granted certain benefits of the Relief Act to persons selected for such training and service.

Except as to certain portions of the act declared inoperative, the Soldiers and Sailors Relief Act of 1918 is now in force and effect and supplements our statutes and rules of procedure.

It should be noted that some of the benefits of the original Relief Act are not granted to persons under either of the foregoing acts. Particularly, provisions of the act relating to protection against lapsing of insurance policies and against tax sales upon land have been omitted.

It should also be noted that the act does not release or discharge any person from his contractual or legal obligations. Its aim is principally to suspend actions and thereby protect one in military service. The act grants discretion to the court, in many instances, as to the extent relief shall be granted under the act or what terms or conditions should be imposed.

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*Of the Denver Bar.

†Note: Articles in Illinois Law Review, February, 1918, Vol. 12, No. 7, by John H. Wigmore, Mansfield Ferry and Samuel Rosenbaum.

The benefits of the act accrue, not when a person is inducted in active service but from the date he is *ordered* to active duty. The period of military service ends 60 days after the termination of active service. Criminal penalties are provided for in event of violation of some provisions.

ANALYSIS OF THE ACT

General Provisions (Sec. 103): The act is intended to apply not only to persons in military service, but its benefit may also be granted to sureties, guarantors, endorsers and others subject to the obligation or the liability. The court is given wide discretion in these matters and generally may or may not grant relief, dependent upon the particular facts involved.

Defaults (Sec. 200): Plaintiffs are required in default cases, before entering judgment, to file an affidavit setting forth facts that the defendant is not in military service. If the plaintiff is unable to determine whether the defendant is in such service, and an affidavit is filed so showing, an order of court is required to have judgment entered. If a defendant is in military service, no judgment may be entered until the court shall have appointed an attorney to represent the defendant and protect his interest. The court may also require the filing of a bond to protect a defendant, if in military service, against loss or damage that he may suffer should the judgment be thereafter set aside in whole or in part. The court may also make such other and further orders or enter such judgment as may in its opinion be necessary to protect the rights of the defendant in the service.

Appointment of Attorney (Sec. 200 (3)): The act provides that in any action or proceeding to which a person in military service is a party and if such party does not personally appear or is not represented by an authorized attorney, the court may appoint an attorney to represent him. The court may also require a bond. An attorney appointed has no power to waive any rights of the person for whom he is appointed or bind him by his acts.

Vacating Judgment (Sec. 200 (4)): The act provides that if a judgment is rendered against the person in military service during the period of such service, or within 30 days thereafter, and such person was prejudiced by reason of his military service in making his defense, such judgment may, upon application within 90 days after the termination of military service, be reopened and the defendant permitted to defend, provided he has a meritorious or legal defense to the action or some part of it.

Stay of Action (Sec. 201): At any stage in an action or proceeding a court may in its discretion stay an action or proceeding against the person in military service during the period of his service, or within 60

days thereafter, unless in the opinion of the court the ability to prosecute or defend the action is not materially affected by reason of his military service.

Penalties (Sec. 202): A court may relieve a fine or penalty incurred under the terms of a contract for non-performance where the ability of the person to pay or perform was materially impaired by reason of his military service.

Attachments and Garnishments (Sec. 203): The court may, in its discretion, stay executions or orders, vacate or stay any garnishment or attachment before or after judgment in an action against a person in military service before or during the period of such service or within 60 days thereafter.

Length of Stay (Sec. 204): Stays ordered by the court generally, and except as otherwise provided, may be for the period of military service and three months thereafter, and subject to such terms as may be just. That is, the court may fix installment payments or terms to be complied with upon granting the stay. The court may also grant leave to proceed against co-defendants who are not parties to the action.

Statute of Limitations (Sec. 205): The period of military service is excluded in computation of such statutes.

Rent (Sec. 300 (1)): No eviction can be made during the period of military service in respect to any premises occupied chiefly for dwelling purpose by the wife, children or other dependents of such person, where the rent does not exceed $50.00 per month, *except upon leave of court* granted therefor, or such an order granted in an action. The court may, in its discretion, stay the proceeding for not longer than three months or make such other orders as may be just, provided that the payment of rent is materially affected by reason of such person being in the military service.

The Secretary of War or the Secretary of the Navy may order an allotment of the pay of a person in military service in a reasonable proportion to discharge rent.

Installment Contracts (Sec. 301 (1)): The section covering this subject is as follows:

> "That no person who has received, or whose assignor has received, under a contract for the purchase of real or personal property, or of lease or bailment with a view to purchase of such property, a deposit or installment of the purchase price from a person or from the assignor of a person who, after the date of payment of such deposit or installment, has entered military service, shall exercise any right or option under such contract to rescind or terminate the contract or resume possession of the property for nonpayment

of any installment falling due during the period of such military service, except by action in a court of competent jurisdiction."

The purport of the above section is to require a court proceeding to terminate or rescind an installment contract or to resume possession of the property sold. This section applies and extends to both the original vendor or his assignee provided a deposit or installment has been paid. Further, if the instrument used be a lease or bailment contract where the goal is a purchase the act applies. Other conditions appear to be required to bring the act in effect:

(1) A deposit or installment upon the purchase must have been paid.

(2) The person entered military service after the deposit or installment was paid.

(3) The non-payment occurred concerning an installment falling due during the period of military service.

It would appear from this section that if no deposit or installment was paid prior to the person entering military service or if the non-payment of an installment occurred prior to the period of military service, the provisions of this section are inapplicable. There seems to be no reference in this section to acts of default other than non-payment of installments.

A criminal penalty is provided for failure to observe the mandates of this section. Upon a hearing of such action, the court may order the repayment of prior installments or deposits, or any part thereof, as a condition of terminating the contract and resuming possession of the property, or it may stay proceedings if the defendant is unable to comply with the terms of the contract due to his military service; or it may make such other disposition of the case as may be equitable to conserve the interests of all the parties.

The parties may agree to terminate or cancel the contract pursuant to mutual agreement if such agreement is in writing and subsequent to the making of the contract and during the period of military service. (Added by the Selective Service and Training Act of 1940.)

Mortgages, Trust Deeds and Securities (Sec. 302 (2)): The provisions of the Relief Act, Sec. 301 (1), relating to installment contracts for purchase of real or personal property, do not apply to mortgages, trust deeds or securities. A Texas court so held in the case of Bashman v. Evans, 216 S. W. 446. This distinction is of importance, since no language appears in the sections relating to mortgages, trust deeds and securities to prevent repossession without a court action. A further distinction appears since the sections of the Relief Act relating to mortgages, trust deeds and securities only apply to such instruments originating *prior* to the dates of the approval of the National Guard Act and Selective

Service and Training Act (August 27 and September 16, 1940, respectively), while as to installment contracts of purchase the date of origin of the instruments is of no materiality, as long as a deposit or installment was paid before the person entered military service.

There may be some inconsistency in the foregoing distinctions made and the wisdom of Congress in differentiating between such types of instruments.

Sec. 302 (1) of the Relief Act is as follows:

> "That the provisions of this section shall apply only to obligations originating prior to the date of approval of this Act and secured by mortgage, trust deed, or other security in the nature of a mortgage upon real or personal property owned by a person in military service at the commencement of the period of the military service and still so owned by him."

Under the Relief Act then as to mortgages, trust deeds and securities, before the Act may be applicable the said instruments (1) must have originated prior to the effective date of the revival of the said act and further, (2) the real or personal property must still be owned by a person in military service at the commencement of the military service and (3) still be so owned by him. Unless the foregoing conditions exist the sections of the act relating to mortgages, trust deeds and securities do not apply.

In the event the foregoing conditions do exist, the act provides (Sec. 302 (2)) that if an action be commenced a court may stay such action or make such other disposition of the case as may be equitable to conserve the interests of all parties, unless the court is of the opinion that the ability of the defendant to comply is not affected by reason of his military service.

A further important provision of the act relating to mortgages, trust deeds and securities is as follows:

> "Sec. 302 (3). No sale under a power of sale or under a judgment entered upon warrant of attorney to confess judgment contained in any such obligation shall be valid if made during the period of military service or within three months thereafter, unless upon an order of sale previously granted by the court and a return thereto made and approved by the court."

As has been stated as to mortgages, etc., the act is silent as to retaking or resuming possession of the property. It concerns itself primarily with the *method of foreclosure* requiring a sale through an action and an order of court. Chattel property may be repossessed without violating the Relief Act, but such possession would be of little value unless the court would permit a sale of the security. If, however, a replevin suit

or a possessory suit is filed the court may stay the proceedings, in its discreton, as an ordinary action.

Transfers of Interest (Sec. 600): In order to protect against evasion of the Relief Act, it provides that any interest or contract transferred or acquired since the date of the approval of the act to avoid or delay its provisions may nevertheless be subject to orders of court in any proceeding.

Decisions of Courts: Some of the early authorities have adjudicated portons of the act now in effect. For example, the effect of failure to file an affidavit that a defendant is not in military service when default and judgment are taken, was passed on in the cases of Howie Mining Co. vs. McGary, 256 Fed. 38, and Harrell vs. Shealy, 100 S. E. 800, 24 Ga. App. 389. The court held that a default judgment against a defendant cannot be vacated for failure to file such affidavit unless the record shows that the defendant was, as a matter of fact, in military service. To the same effect is the case of Alzugaray vs. Onzurez, 187 Pac. 549, 25 N. M. 662, and the case of Wells vs. McArthur, 188 Pac. 322, 77 Okla. 279. The holding of these cases seems to be that a defendant who is not in the military service cannot take advantage of the failure of plaintiff to file such affidavit.

Concerning the foreclosure of real estate mortgages, in the case of Taylor vs. McGregor State Bank, 174 N. W. 893, 144 Minn. 249, the court held that where a foreclosure and sale had been had by advertisement as authorized by the Minnesota statutes, which was fully completed prior to the commencement of the mortgagor's military service, the redemption period which had not expired was not extended by the act by such person being in such service.

In a decision of the United States Supreme Court, in the case of Ebert vs. Poston, decided January 12, 1925, 45 Law Ed. 188, Mr. Justice Brandeis delivered the opinion of the court and also held that the period of redemption under foreclosures by advertisement was not extended for a period of military service under the Soldiers and Sailors Relief Act. The court stated that a decree of foreclosure may be stayed if the suit was commenced after the passage of the act and during the period of military service. It is only sales made after the passage of the act and during military service that are invalidated if made without leave of court. The statutory right to redeem from a sale by advertisement is not a right of action. It is a primary right as distinguished from a remedy.

In the case of Lima Oil Co. vs. Pritchard, 92 Okla. 113, 218 Pac. 863, the court held that property may not be transferred to one in military service to delay parties to a contract or proceeding in enforcing their rights.

In the case of Riordan vs. Zeebe, 50 Calif., App. 22, 195 P. 65, the court held that justice of the peace courts come within the act.

The act has been held to apply to equitable interests as well as legal interests of a person in military service, and even though unknown to one foreclosing a real estate mortgage, the equitable interest was protected. Hoffman vs. Bank, 121 N. E. 15. This ruling seems to be a harsh one.

In the case of Davison vs. Lynch, 171 N. Y. S. 46, the court held that an attorney appointed to protect the interest of a person in military service was not to be allowed any compensation and should regard such service as a patriotic duty.

In the case of Kendall vs. Balster, 131 N. E. 319, 239 Mass. 152; the court held that mortgages executed at a date subsequent to the approval of the act are not affected by it.

Other cases have been decided by the courts of various jurisdictions. However, there are many propositions under the act that are still undetermined and require clarification. Probate and real estate actions are examples of these. At the present time it appears likely the act will be a factor to be considered and coped with for many years to come. The act places the court in the position of being a chancellor in equity, a conciliator and the guardian and protector of persons in military service.

Every lawyer, to conscientiously serve his client, should give careful attention to it, not only as to the language employed and its interpretation, but, in addition, such consideration should be given as to place proper emphasis upon the patriotic motives which impelled its revival and its broad purpose to conserve and preserve the rights of persons in service of our country.

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The following have been appointed to constitute the Membership Committee of the Denver Bar Association:

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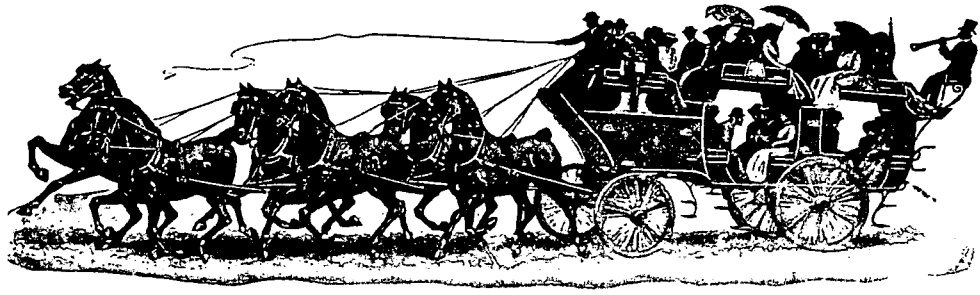
"ALMOST"

Trial Lawyer, almost invincible before a jury; has large corporate practice; would undertake to assist in the trial of important litigation anywhere in the United States; has refused steady employment as trial lawyer offered him by one of the largest law firms in America. References. Address reply Box 521, care of West Publishing Co., St. Paul, Minn.



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CALENDAR

January, 1941..... Annual Meeting Colorado Association of District Attorneys

Colorado Bar Proposes:

New Rules of Civil Procedure
Supreme Court Judical Conference
Revision of Probate Practice
Improved Methods of Judical Selection
Sections Organized at Annual Meeting

Practical aspects of the practice of law were emphasized at the 43rd Annual Meeting of the State Bar held at Colorado Springs, September 27 and 28, 1940. After listening to the report of the Code Revision Committee on Friday afternoon and asking some questions regarding the proposed rules, the Convention unanimously approved the report of the committee. It referred the rules to the Supreme Court and requested adoption.

The convention also suggested to the Supreme Court that a judicial conference be held to enable the judges of all courts to discuss the rules.

The convention also recommended that the present system of electing judges be changed so that the selection of judges would be removed from politics. The exact details of such a plan were left to the committee for further study and report. The Convention also approved a resolution requesting that supplements to the Compiled Statutes be issued hereafter only every two years, and approved the creation of committees to study problems of procedure arising from domestic relations cases, and of small claims courts.

After completion of routine matters on the opening day of the convention, the association heard an excellent speech by Farrington R. Carpenter of Hayden on "The Law of the Range." Members attending the luncheon that noon were entertained by the Law Club of Denver, which, under the guidance of its president, Gordon Johnston, offered three humorous speeches by Allan (Haddock) Phipps, Thompson (S.A.L.S.) Marsh and "Senator" Cecil Draper.

As soon as a discussion of the report of the Code Revision Committee was completed that afternoon, Louis A. Hellerstein of Denver spoke on the timely subject of "The Sailors and Soldiers Relief Act—Its Provisions and Effect."

Because of the pressure of business, Robert H. Jackson could not attend the convention and Francis M. Shea of Washington, D. C., United States Assistant Attorney General, kindly substituted. The subject of his talk was "The Lawyer's Part in the Country's Defense."

The Saturday morning session was devoted to two sectional meetings—one was devoted to water rights and the other to probate practice. The section on irrigation, after listening to papers by A. W. McHendrie of Pueblo and Clifford H. Stone of Fort Collins, voted to organize itself as a regular section of the association. The probate section listened to splendid papers by Benjamin F. Koperlik of Pueblo, Ben S. Wendelken of Colorado Springs, H. Lawrence Hinkley of Sterling, Osmer E. Smith of Golden, C. Edgar Kettering of Denver, and Percy S. Morris of Denver. It resolved that the probate laws should be made uniform, consistent and concise and appointed a committee to study the problem.

The Saturday luncheon meeting was devoted to an address by Justice William Lee Knous of the Supreme Court on "Improved Methods of Judicial Selection" and to a discussion of proposed reforms as suggested by the committee report given by J. Ramsey Harris of Denver.

A symposium on trial practice was held on Saturday afternoon with Claude C. Coffin, Kenneth W. Robinson, and John N. Mabry relating their experiences and giving some helpful points in trial practice.

The convention then adjourned after electing W. W. Platt of Alamosa as president-elect, and Osmer E. Smith of Golden, John R. Clarke of Glenwood Springs, Harry S. Petersen of Pueblo, and Ben E. Sweet of Denver as vice-presidents.

Preceding the banquet that evening the Broadmoor Hotel entertained at a cocktail party in memory of Mr. Spencer Penrose. Jesse R. S. Budge of Salt Lake City delivered the banquet speech.

William E. Hutton of Denver was introduced as the new president and he announced the appointment of Edward C. King of Boulder as treasurer, and Wm. Hedges Robinson, Jr., of Denver as secretary. The banquet guests were entertained with several violin solos by Henry T. Ginsburg of Denver.

Junior Bar Recommends:

More Stringent Enforcement of Rules on Moral Qualifications of Embryo Lawyers

The annual meeting of the Colorado Junior Bar Conference was held on September 29, 1940 at the Broadmoor Hotel in Colorado Springs. Hugh D. Henry, chairman, reviewed the activities of the year. He pointed out that the year saw 48 new members enrolled, which was a 240% increase in Colorado's quota for the year as set by the National Conference. Particularly laudatory of the year's efforts was the work of the committees on Bar Examinations, Judicial Selection, Placements,

Meetings and Arrangements, Membership, and Public Information and Speaking.

It was resolved by the conference that the Committee on Judicial Selection, under the chairmanship of J. Ramsey Harris of Denver, be empowered to examine the matter of court structure in Colorado and report its recommendations along with its work on judicial selection. Upon the suggestion of David J. Miller of Greeley, an attempt is to be made to have a discussion on "The Lawyer's Office" at one of the meetings where the membership of the conference will be well represented.

After Sydney E. Shuteran of Denver, chairman, read the report of the Committee on Bar Examinations, it was resolved that the following method of obtaining proof of the moral and ethical qualifications of applicants to the bar be recommended:

1. All students who have made the preliminary requirements for entrance into an accredited law school shall submit to a written examination relating to their moral and ethical qualifications and that this be a condition precedent to admission.

2. That each student who commences his legal education shall be advised in writing of the moral and ethical qualifications required, and that admission be denied the applicant who does not measure up to the required qualifications.

3. That each applicant, upon taking bar examination, be required to sign under oath a written statement answering detailed interrogatories relating to every possible act or form of conduct which would reflect the character of the applicant.

4. That an accredited commercial report be obtained for each applicant.

5. That a detailed written report by the bar committee be submitted for each applicant to include both the written examinations of the applicant and a report of the examiner.

6. That all applicants under the Supreme Court, rule No. 62, who come within class A, B or C shall be required to give six months' written notice of their intention to be admitted and submit to a written examination relating to moral and ethical qualifications of the applicant.

Following this report, Phil Lewis of Topeka, Kansas, National Vice-chairman of the conference, addressed the members. He pointed out the fact that Colorado's record for membership is one of the bright spots in the nation, and recommended continued efforts be made to secure greater affiliation of the members of the profession in their bar organizations. John W. O'Hagan of Greeley was named State Chairman of

the Colorado Junior Bar Conference, and Ray J. Moses of Alamosa was elected vice-chairman, and Edward J. Ruff of Denver was chosen secretary-treasurer of the conference. Hugh Henry moved that Sec. 1 of Art. 7 of the by-laws be amended so that the committees on American Citizenship, Grievances, Program Suggestions, Legal Ethics and Unauthorized Practice be dropped as committees of the Colorado Junior Bar Conference and that committees on Bar Examinations and Standards of Admission to the Bar be combined. The motion was carried. The by-laws were further amended by making the retiring chairman an honorary member of the council without vote one year after his retirement until his membership in the conference expires. William L. Branch of Denver and Joseph Peterson of Pueblo recommended that a Committee on Legal Aid be made part of the committee structure of the Colorado Junior Bar Conference.

John W. O'Hagan, as the new chairman, in his brief remarks, pledged his untiring efforts to continue the work already accomplished by the preceding chairmen, Mark Harrington and Hugh D. Henry of Denver; that a very definite effort will be made for the ensuing year to see that Colorado remains high in the list of states enrolling new members, and to do what he could through the conference to enhance the value of the conference to its members. *—John W. O'Hagan.*

AND THIS IS THE "LAND OF THE FREE!"

YOU CANNOT refuse to employ workers in your plant just because they belong to a union. A federal circuit court of appeals upholds a Labor Board order to this effect and orders the employer to make "back pay" payments to the workers whom he never hired.

YOU CANNOT safely grant a wage increase at the request of a committee of your employes if, at the same time, a national union is attempting to organize your plant. A federal circuit court of appeals holds in two cases that such wage increases were unfair labor practices under the Wagner Act.

YOU CANNOT discharge a foreman because he engaged in union activities. A federal circuit court of appeals holds that foremen, like all other employes, are protected from interference in their union activities by the Wagner Act. On the other hand, activities of foremen which interfere with union activities of your workers can involve you in a charge of Wagner Act violation.

A. B. A. Highlights

Convention Averts Fight on Third Term; Movement to Liberalize Selection of Board of Governors Loses; Public Defender Plan Approved

By vote of approximately two to one, the assembly of the American Bar Association in convention at Philadelphia tabled the proposed resolution condemning Presdent Roosevelt's third term candidacy. A substitute measure calling for a constitutional amendment to make the Chief Executive ineligible for reelection after a single six-year term also was tabled. By this action the assembly averted what had threatened to be an "all out" fight on the convention floor, and the necessity of taking a position on a hotly controverted political issue.

At the same session the assembly was persuaded by Hatton W. Sumners, chairman of the House of Representatives judiciary committee, to approve his legislation provding for trial by a court of federal judges on the good behavior issue. The resolutions committee had proposed to refer the matter to the Association's jurisprudence and legal reform committee, but Judge Sumners insisted action be taken at once, contending that the impeachment method is cumbersome and inefficient, and that if people who are demanding a better remedy do not get it, they will insist that the Department of Justice be empowered to deal with dishonest judges.

Over some objection the assembly adopted a resolution calling for appointment of a special committee on national defense to ascertain what the bar can do in the defense program, and to make the bar's services available to the government.

A resolution approving in principle the public defender plan for state as well as federal courts was referred to the legal aid committee.

The Association at its annual dinner presented to former Dean Roscoe Pound, of Harvard, its medal for conspicuous service. James Grafton Rogers, of Yale, made the presentation address. Awards for most outstanding work by a state and local bar association went to the Texas State Bar and the Cleveland Bar Association, respectively.

An attack on "ambitious plans" for "socialized legal services" was made by Roscoe Pound, dean emeritus of the Harvard Law School, in an address before the legal aid committee.

"Unless I do these plans an injustice, they seem to me to be in the spirit of a trade union rather than in the spirit of a profession," he said.

"They seem to me to proceed upon a fundamental idea of equalizing the rewards in a money-making calling, not on an idea of insuring justice as the task of a calling pursued in the spirit of a public service, even if it does incidentally involve a livelihood.

"Instead of pulling the litigant of means with his more complicated and normally difficult case, down to the position of the needy accused who has to have counsel assigned to him by the court, I should like to see the litigant without means pulled up as near as may be to the level of the better off. So far as that can be done, under the conditions of the present, that is done by legal aid."

The House of Delegates, after prolonged discussion, defeated a move by one of the Association's past presidents, Clarence E. Martin of Martinsburg, W. Va., to "democratize" the Board of Governors by making any member of the Association eligible for election to it. At present only members or former members of the House of Delegates are eligible.

Friends of Mr. Martin represented him as believing that the machinery of the bar association, because of this stricture, was in the hands of a small clique. His proposal lost by a close vote.

New members elected to the Board of Governors were Sylvester C. Smith, Jr., of Newark, N. J., representing the Third Circuit; John W. Slaton of Atlanta, Ga., Fifth Circuit, and Robert R. Maguire of Portland, Ore., Ninth Circuit.

Objectives of Administrative Court Office Stated by Director

Most of the organization work of the office has been completed, and a staff of over 70 persons is progressively taking over most of the services to the courts formerly rendered by the Department of Justice, according to Henry P. Chandler, director of the Administrative Office of the United States Courts. The office has been in operation for more than nine months.

One of the objectives of the office is to provide the courts with their material needs, including adequate and suitable quarters, supplies and equipment, stenographic and professional assistants and an adequate number of judges.

A general standard for new libraries has been evolved by the Department of Justice in recent years, and is being tentatively followed by his office, Chandler said. The cost of the standard library for a district judge approximates $3,500, and for a circuit judge, $4,500.

For some years law clerks have been furnished to circuit judges but not to district judges. The appropriation act for the courts for the fiscal year 1941 provides that two law clerks to district judges may be appointed upon a certificate of necessity by the senior circuit judge of the circuit.

Opinion varies as to the need for law clerks in district courts, Chandler said, but declared that, "I can see no reason why the judge should not be helped by a clerk. * * * In any event, a law clerk is a means of reenforcing the judge, which I submit we should try to the extent that the provision in the appropriation for 1941 permits."

The second objective of the administrative office is to confirm the courts from time to time of the state of their business and to help them devise ways and means of handling it more efficiently. Chandler asserted that the office will give "continuous attention to the form of the judicial statistics with a view to making them reflect as accurately as possible the actual conditions."

The general supervision of the probation officers was committed to the administrative office along with all other administrative matters relating to the administrative personnel of the courts.

"It is for us, the judges and the administrative office working together," Chandler said, "to prove that the change will be for the best; not only that there will be no lowering of standards, as some profess to fear, but even an improvement in the quality of the service to which the Bureau of Prisons has made so valuable a contribution."

The director declared himself a sincere believer in probation for large numbers of offenders of the milder types. He appealed to judges to make selection of probation officers "with recognition of the importance of adequate education and training for what is a specialized educational task, and above all of character on the part of the probation officer that gives sanction to his counsels of right living."

Dinner for Newly Admitted Members of Bar Held in Denver

The Colorado Junior Bar Conference, with the aid of the Colorado Bar Association and the Denver Bar Association, held its semi-annual dinner for the newly admitted members of the bar on Friday, September 20, at the Albany Hotel in Denver, following the ceremony of admission in the Supreme Court. All of those who were sworn in, forty out of a class of forty-six, were present as guests of the bar groups at the dinner. There were approximately thirty members of the bar in attendance at the dinner, including Supreme Court Justices Knous, Burke, and Bakke, J. A. Phelps of Pueblo, Judge Hotchkiss of Mesa County, and others.

Leo Altman of Pueblo, vice-chairman of the Junior Bar Conference, presided in the absence of the conference's chairman, H. D. Henry of

Denver. The speakers were Chief Justice Benjamin C. Hilliard of the Colorado Supreme Court, who spoke on the various qualities which are necessary to a lawyer's success, Kenneth W. Robinson of Denver, whose advice to the younger lawyers from an able trial lawyer's viewpoint was greatly appreciated, and Dean Edward C. King of the University of Colorado School of Law, the topic of whose speech was "Gentlemen of the Bar," which indicates, exactly, the subject matter of the address.

Our gratitude is again extended to the Supreme Court, without whose cooperation the plans for dinner could not have been successfully completed.

—Edward J. Ruff.

District Attorney Clyde L. Starrett Dies After Brief Illness

Clyde L. Starrett, district attorney for the fourth judicial district, died at Beth-El Hospital at Colorado Springs on August 31, 1940. He was ill only a short time before his death.

Mr. Starrett, who served as district judge in 1931 and 1932, succeeding the late Judge Ralph Finnicum, was elected district attorney in 1932 and was reelected in 1936. His term would have expired in January.

Mr. Starrett was born in Lancaster, Missouri, in September, 1871, and he was educated in that town. He married Lillian Mitchell of Lancaster in 1894.

From 1889 to 1900 he was official court reporter for the 27th judicial circuit of Missouri. He moved to Colorado Springs in 1900 and immediately after moving there was made a deputy clerk in the county court. He was clerk of the district court there from 1902 to 1907.

He was admitted to the bar in 1910, and from 1910 to 1914 was police magistrate of Colorado Springs. From 1914 to 1930, Mr. Starrett was engaged in the private practice of law in this city. He was a member of the El Paso County Bar Association and the State Bar, and was prominent for years in Democratic party circles.

He is survived by his widow, Mrs. Lillian Mitchell Starrett, and two daughters, Mrs. Adelaide Gardner and Miss Elizabeth Starrett.

—Charles J. Simon.

Joseph K. Bozard Killed in Auto Accident

Joseph K. Bozard, pioneer Routt County attorney, died September 21, 1940, as the result of injuries received in an automobile accident. He and his wife were returning to Steamboat Springs in their car, which he

was driving, when the car and a westbound coal truck collided on a curve four miles west of Steamboat Springs.

Joseph King Bozard was born November 1, 1872, on Long Island, N. Y., and attended public school in Brooklyn. He came to Colorado as a youth with the family, who located in Greeley. He studied law in Denver and was admitted to the Colorado bar August 1, 1899. For several years he was connected with the well known law firm of Morrison and DeSoto in Denver. He practiced law in Ault, Colo., from 1904 to 1906. Then he came to Steamboat Springs to become a partner of Jacob R. Harding, pioneer attorney of Routt County. For many years he had a successful private practice and had participated in many important legal matters. He was handling a number of large estates at the time of his death.

His marriage to Ruth C. Becker took place at Sandusky, Ohio, June 22, 1910. For many years Mr. Bozard was chairman of the Routt County chapter of the American Red Cross. During the World war he gave much of his time and effort to the service of this organization. He organized every town and community and during the time he held the office of chairman the Routt County chapter ranked high in the United States.

He was instrumental in the organization of the towns in the Yampa Valley in the project which resulted in securing the fine cabins on upper Elk River for a boys' and girls' camp. Much of his time was devoted to the project which gives opportunity to young people of the valley to enjoy camp life for a period each summer.

Mr. Bozard was past noble grand of the Independent Order of Odd Fellows and a member of the judiciary committee of the grand lodge. He was also a member of the Knights of Pythias. His interest politically was in the Republican party, which he served as county chairman for a few years. His attendance at the conventions was regular and he always was called upon to speak.

Funeral services were held at Craig and interment was in the family plot in the Fairmount Cemetery in Denver.

Surviving him are his wife, a brother, and three nieces.

E. W. McDaniels, La Junta County Court Judge, Dies at His Home

Elmer Willis McDaniels, one of the older members of the Otero County Bar and County Judge of Otero County, died at his home in La Junta on September 18, 1940.

Mr. McDaniels was born near Buffalo, Ill., March 3, 1861, and spent his youth on a farm at that place. In 1882 he went to Utah, where

among other vocations he taught in the public schools, returning to Illinois in 1884, and taught school in that state for four years. He returned to Ogden, Utah, in 1888 and did newspaper work in that city and Salt Lake City. During this time he studied law and was admitted to the practice of law in Utah in 1893. After being admitted to practice law he opened an office in Richfield, Utah, and was elected prosecuting attorney for Sevier County, Utah, in 1896.

In the spring of 1900 he came to La Junta and with the exception of a very brief period was actively engaged in the practice of law at that place or was on the bench from that time until his death. Shortly after coming to La Junta he was city attorney for a term of two years, which office he again held from 1929 to 1933. In 1905 he was Deputy District Attorney under District Attorney S. Harrison White, and he filled the same office again from 1933 until 1937 under District Attorney French L. Taylor. He held the office of County Judge from 1909 until 1921, and from 1937 until the time of his death, and was candidate for re-election at the coming election.

On October 18, 1919, he was married to Mildred Ann Field of La Junta, who survives him.

While interested in many matters of public interest, he was especially active in the Elks Lodge. He was a member of La Junta Lodge No. 701, B. P. O. E., and served as its Exalted Ruler 1918-1919, and was Deputy Grand Exalted Ruler, Colorado East, for 1920.

—*George S. Cosand.*

San Luis Valley Association Meeting

A meeting of the San Luis Valley Bar Association was held at the Walsh Hotel in Alamosa on Saturday, September 14, at which approximately 20 members were in attendance.

Ralph C. Horton, Deputy District Attorney, spoke on the question of "Mileage and Travel Expense Fees of Sheriffs and Constables in Colorado." A general discussion, in which all present joined, was had afterward.

Frank Shaw of Monte Vista, the president of the association, presided.

George M. Corlett of Monte Vista was chosen to succeed himself as the member of the board of governors from this district.

—*Jesse E. Pound.*

Supreme Court Decisions

No. 14640. *Dillon v. Sterling Rendering Works, Inc., et al. Decided September 16, 1940.*

Action of negligence. Finding below of negligence in defendant and contributory negligence on part of plaintiff; reversed for further trial.

No. 14830. *Moore v. Burritt, et al. Decided September 16, 1940.*

In action for injunction, defendant contends that his answer and cross-complaint could not be stricken as sham where cross equitable relief is sought. Held, that the striking out was proper. In any event, the defendant was not prejudiced, having been permitted to introduce evidence "as fully as though his cross-complaint had not been stricken out."

No. 14827. *Dependency of Jessie Jones, Infant. Jones v. Wheeler, et al. Decided September 16, 1940.*

Denial below of petition for rehearing in dependency which had resulted in commitment to home for dependent children was error where evidence was offered to show capability and willingness of maternal aunt to take and care for the child in her home. The welfare of the child should be the controlling element considered.

No. 14577. *Rosenberg, doing business as Barnum News v. Donovan, doing business as Edna Cash Grocery. Decided September 16, 1940.*

On conflicting testimony verdict for defendant affirmed.

No, 14580. *Serv-Us Chain Stores, Inc. v. Arden Realty and Investment Company. Decided September 16, 1940.*

In suit for rent of Park Hill store, directed verdict below for plaintiff reversed because (1) the assignee of plaintiff, a necessary party, was not joined: (2) a question of fact existed as to fraud in connection with plaintiff's lease.

No. 14664. *Conklin v. Armstrong, et al. Decided September 16, 1940.*

Controlled by In Re Interrogatories of Senate, 100 Colo. 342, 67 P. (2d) 1038. The ruling is that writ of mandamus will not lie to

compel state officials to pay 85% of all revenues from service tax into pension fund.

No. 14738. *McFadden v. People ex rel. Lewis. Decided September 16, 1940.*

Judgment affirmed on the basis of *People v. Downen,* decided this day. (See next case.)

No. 14691. *People ex rel. Wade v. Downen. Decided September 16, 1940.*

Question: Does appointing power to office of member of real estate brokers' board reside in the Governor or in the Secretary of State?

Answer: In the Governor.

Because the express authority of 1925 S. L. Ch. 147 is not repealed by implication by the Administrative Code of 1933, Ch. 3, '35 C. S. A., which makes the heads of departments responsible for their departments.

No. 14828. *Reeser v. People. Decided September 16, 1940.*

Dependency petition by mother of an unborn child. Verdict against respondent Reeser. Held, under the facts, motion for new trial on grounds of newly discovered evidence, should have been granted.

No. 14621. *People use of The Federal Land Bank of Wichita, Kansas v. Ginn, et al. Decided September 23, 1940.*

Action on the official bond of a county clerk and recorder for his negligence in transcribing to his records a trust deed upon the S. W. ¼ of Sec. 7, etc., as being upon the S. E. ¼ of Sec. 7, etc. As a result of this error, plaintiff bank loaning money on S. W. ¼ of Sec. 7 was left in ignorance of the prior trust deed, and subsequently lost its security and its money.

The principal questions:

(1) At what time does plaintiff's cause of action accrue, so as to start the running of the statutes of limitation?

(2) Is plaintiff barred by constructive notice through the correct trust deed, itself filed for record, or by the indices correctly transcribed by the clerk?

(3) Is plaintiff barred by its own negligence in not examining the records themselves, instead of relying entirely upon an abstract furnished by an authorized abstract company?

The court holds:

(1) Following *People v. Cramer,* 16 Colo. 155, 25 Pac. 302, and reiterating "the minority rule" as the law of this state "that the statute

(of limitations) begins to run at the time of the occurrence of the consequential injury caused by the breach of duty and not at the time of the breach." Further, that the consequential injury occurred in this case when plaintiff's trust deed was established by judgment as inferior to the one inaccurately recorded.

(2) That the constructive notice of a recorded instrument itself protects holders under such instrument and is not notice to bar an action such as this.

(3) That the record itself controls and correct indices are not notice.

(4) That there can be no requirement for plaintiff to search the records; the abstracter is its agent for such purpose, and it may rely on the abstract.

Judgment below sustaining the defense of statute of limitations reversed, with directions to ascertain the damage sustained by plaintiff and to enter judgment accordingly.

No. 14835. *Byouk v. Industrial Commission, et al. Decided September 23, 1940.*

Affirms the Industrial Commission's award of $3,640 as the statutory maximum on a finding of 60% permanent partial disability. The fact that claimant probably could never work again as a coal miner is not the sole test to determine whether his disability be total or partial, although it is pertinent and material to such question. Conflicting evidence appears as to his present and probable future ability to do other work.

No. 14633. *Hill v. Hill. Decided September 23, 1940.*

Appeal from order of district court allowing plaintiff judgment for $2,080.00 instead of $5,646.00, which she claimed as alimony arrearages.

Affirmed. The court finds sufficient evidence of a modifying agreement between the parties reducing the amount to that involved in the lower court's decision.

No. 14865. *People ex rel. Lenzini v. District Court. Decided September 25, 1940.*

Under Rule 14C of the Supreme Court an alternative writ against District Judge Ralston made peremptory.

Original Proceeding in Prohibition. It here appears that Hon. John L. East disqualified himself, *sua sponte,* in the trial. Over protest of petitioner he transferred the cause to Hon. David M. Ralston, District

Judge of the same district. Alternative writ thereupon issued from this court. The matter being now at issue, the Supreme Court holds that Rule 14C is applicable. Writ accordingly made peremptory as to Judge Ralston, the cause remanded to Judge East to proceed in conformity to said rule, the ten days provided thereby to begin to run from the date of this order.

No. 14778. *Miller, et al. by Aubert, Next Friend v. Industrial Commission of Colorado, et al. Decided September 3, 1940.*

Action by two minor daughters of deceased employee to correct an award of the Industrial Commission which refused compensation because of failure to file notice claiming compensation within the time required by C. S. A. Chapter 97, Section 36.

(1) That payment of hospital and medical expenses is not payment of compensation.

(2) That since the statute fails to make minority disability a fact tolling the statutory limitation, it is not within the province of the courts to do so.

(3) Ignorance of the fact of the father's death (as of facts giving rise to a cause of action) does not delay or suspend the operation of the statute of limitations. Judgment affirmed.

No. 14818. *Keithline, et al. v. Keithline, et al. Decided September 3, 1940.*

The plaintiffs, heirs (but not all the heirs) of their parents' estate, took over, built up and cared for a certain dairy business belonging to such estate and they seek a decree giving them the dairy business to the exclusion of the other heirs. Held, below that all heirs were tenants in common of such business.

Judgment affirmed. Tenants in common are not entitled to compensation from each other for services rendered in the care and management of the common property in the absence of a special agreement or mutual understanding to that effect.

In the following cases judgment was affirmed without a written opinion:

No. 14805. *Graham, et al. v. Severance. Decided September 16, 1940.*

No. 14831. *Kamp, et al. v. Ficcio. Decided September 23, 1940.*

No. 14753. *Mental Incompetents; Jurisdiction. People ex rel. Smith v. County Court, et al. Decided April 8, 1940. Original Proceeding in Prohibition. In Dept. Writ Issued.*

FACTS: A. Petitioner seeks the exercise of the original jurisdiction of the Supreme Court to prohibit the County and District Courts of Fremont County and their judges, from exercising any jurisdiction over property of petitioner or over claims heretofore filed in a proceeding in the County Court, entitled, "Matter of the Estate of Will H. Smith, Mental Incompetent", other than to approve the final report of the conservatrix and to return petitioner's property to him, he having been legally adjudicated a mental incompetent prior to said proceedings and subsequently adjudicated restored to mental competency and released.

HELD: 1. Where it appears that mental incompetent has been adjudicated restored to reason, and conservatrix petitions court for discharge and due notice is given setting a certain date, and on that date, due to illness of judge, hearing was continued to another date, and where it appears that prior to latter date final report was filed, that petitioner approved report in writing and prayed for discharge of conservatrix and asked for return of property, and where it appears that petitioner, in writing, agreed to assume the payment of all lawful claims and had paid all expenses of administration, then, certain claimants with unallowed claims may not, on latter date, have their claims adjudicated in said court prior to the discharge of the conservatrix.

2. Upon restoration of petitioner's competency, the county court has no jurisdiction except to settle the accounts of the conservatrix and restore to him control of his property, and it may not make any orders attempting to control the property, burden it, or impose any judgment obligation on the petitioner, and such orders are void.

Opinion by Mr. Justice Young. Mr. Chief Justice Hilliard and Mr. Justice Knous concur.

No. 14736. *Workmen's Compensation; Assignment of Policy; Estoppel; Fifty Per Cent Penalty for Failure to Carry Insurance. Anderson, et al. v. Dutch Maid Bakeries, et al. Decided April 8, 1940. District Court, Denver. Hon. Joseph J. Walsh, Judge. Judgment affirmed in part and reversed in part. In Dept.*

FACTS: A. Employer of injured employee is successor by purchase of the Wigwam Bakery. It had previously been conducted by a partnership which in turn had succeeded one of its members who had been doing business as an individual. The latter was insured in the State Fund, but the policy remained in his name and no claim was asserted under it while the partnership conducted the business.

B. The purchaser and present owner, paid the partnership (seller) the amount of the unearned premium on the policy, but no as-

signment of the policy was made, nor was the Fund notified of change of ownership, although policy required both steps and the approval by insurer of the assignment.

C. Employer contended that since another employee had been injured, after change of ownership and a report made to the commission and Fund, and on the claim blank someone had written over the stated name of the employer "Dutch Maid Bakeries, Inc.," the name "Wigwam Bakery," the Fund had notice of the assignment and therefore was estopped to deny liability. (This prior claim was never prosecuted.)

HELD: 1. The mere report of the prior accident and the unexplained writing in of the name "Wigwam Bakery" can not take the place of a specific assignment and consent thereto as required by the policy.

2. Estoppel may not be predicated on the facts stated.

3. The statute ('35 C.S.A., Chapter 97, Section 306) provides that the employer shall be responsible for fifty per cent additional compensation as a penalty for failure to carry insurance. The liability is not determined by good faith or willful neglect, and it is immaterial that employer thought he had insurance.

Opinion by Mr. Chief Justice Hilliard. Mr. Justice Bakke and Mr. Justice Burke concur.

DICTA

The Denver Bar Association
The Colorado Bar Association

SOLDIERS' AND SAILORS' RELIEF ACT OF 1940

AN ANOMALOUS TAX SITUATION

NEW RULES AFFECTING PROPERTY RIGHTS

CURRENT EVENTS OF BENCH AND BAR

SUPREME COURT DECISIONS

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